No. 90-464

In the Supreme Court of the United States

OCTOBER TERM, 1990

BITUMINOUS COAL OPERATORS' ASSOCIATION, INC., *Petitioner*

v.

UNITED MINE WORKERS OF AMERICA, INTERNATIONAL UNION, AN UNINCORPORATED ASSOCIATION, BY THOMAS RABBIT, TRUSTEE AD LITEM, *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondents' opposition distorts both the law and the facts. Respondents advocate a radical revision of this Court's decision in *Firestone*, and argue that unless a fiduciary has the discretionary authority "to set and change" eligibility standards, his eligibility determinations are not entitled to any deference. Respondents' argument for widespread *de novo* review by the judiciary is a dangerous misreading of *Firestone* and will improperly thrust federal courts into the role of trust fund administrators and fiduciaries.

Regardless of what respondents now claim the union "intended" when it negotiated the 1974 Benefit Plan's eligibility criteria in 1978, it is clear that the negotiating

parties agreed to a procedure to decide eligibility questions and resolve benefit claims. The agreed-upon procedure was to name five professional trustees—two appointed by the union, two appointed by BCOA, and a neutral trustee, the former Dean of Georgetown University Law Center—and to empower those trustees with "full authority" to investigate and determine eligibility under the Plan's collectively bargained eligibility criteria. As we observed in the petition (at 13), this Court has repeatedly held that collectively bargained methods of private dispute resolution should be given substantial deference, and that a federal court is not authorized to overturn the product of this chosen procedure simply because the court would have reached a different result. Respondents' position on *de novo* review is contrary to this authority, and eviscerates the parties' agreed-upon method for resolving eligibility disputes.

With respect to the facts, respondents try to convert the union's organizing failures into retiree benefits victories. Respondents do not deny that the Plan contains a detailed "no longer in business" eligibility test, and that every single pensioner in this case last worked for a company that currently is "in business" and operating in the coal industry on a nonsignatory or nonunion basis. Respondents, however, advance the astonishing argument that whenever a coal operator goes nonsignatory or nonunion, that operator's retiree health costs can be dumped into the 1974 Benefit Plan, for payment by the nonsignatory's competitors. Respondents contend that BCOA member companies and other signatory employers contractually agreed to pay for the retiree health costs of their nonsignatory competitors. That claim is absurd. BCOA member companies agreed to provide health benefits for their own retirees and for so-called "orphan" retirees of companies that went completely out of business, but they never agreed to pay for the retiree health costs of their competitors.

ARGUMENT

I. RESPONDENTS ADVOCATE THE WRONG STANDARD OF JUDICIAL REVIEW.

A. Respondents' Erroneous Interpretation Of *Firestone* Highlights The Substantial Confusion That Has Arisen, Since *Firestone*, Over The Appropriate Standard Of Review Of Trustees' Eligibility Determinations.

In a transparent attempt to avoid review of the important legal issue presented here, respondents endorse the district court's characterization of this case as a "straightforward factual dispute." Nothing could be further from the truth. The appropriate standard of judicial review is a crucial issue of national significance. It will have a major effect on the business of the federal courts and on the administration and cost of pension and benefit plans throughout the country. The question is whether the courts should defer to the decisions rendered by professional trustees chosen by the parties to collective bargaining, or whether the courts themselves should assume the primary role of adjudicating disputes about the proper application of plan eligibility criteria.

Respondents' reading of *Firestone* is wrong. Rather than tying the appropriate standard of review to the fiduciary's authority to set and change eligibility criteria, this Court stated in *Firestone* that the standard of review was dependent on the power vested in the fiduciary to make eligibility determinations or to construe disputed or doubtful plan terms. 109 S. Ct. at 954, 956. Plainly, a fiduciary can have the authority to make eligibility determinations or construe disputed or doubtful plan terms, even if he does not have authority to set or change the eligibility requirements. *See Wallace v. Firestone Tire & Rubber Co.*, 882 F.2d 1327, 1329 (8th Cir. 1989) ("the right to change or amend a policy is separate and distinct from the right to have discretionary authority to determine eligibility under a policy").

Some courts have properly interpreted *Firestone* and applied a *de novo* standard of review in the absence of plan language giving plan administrators and fiduciaries authority to make eligibility determinations or construe the terms of the plan.[1] Other courts, however, like the district court here, have ruled that *de novo* review is appropriate even in the face of clear plan language giving administrators and fiduciaries the authority to make eligibility decisions and interpret the plan's disputed terms.[2] Review is necessary to remove this judicial confusion in applying *Firestone*.

This case highlights how different courts have applied *Firestone* to virtually identical grants of authority, and yet have reached totally different results. Specifically, in the *Boyd* and *Richards* cases (*see* Pet. 19-20), which involved the UMWA 1974 *Pension* Plan, the trustees were given the authority to make a "full and final determination as to all issues concerning eligibility for benefits." Here, the very same persons, as trustees of the UMWA 1974 *Benefit* Plan, have been given "full authority . . . with respect to administration of coverage and eligibility." There is no principled basis to conclude that there is any difference—much less a difference of the magnitude suggested by respondents—between the authority granted to the trustees under the two plans. Moreover, it is implausible that BCOA and the UMWA would have jointly selected the same group of professional, salaried trustees for the pension and benefit plans, and then given those trustees discretionary authority to make eligibility determinations for one plan and not for the other.[3]

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[1] *See, e.g., Sejman v. Warner-Lambert Co.*, 889 F.2d 1346, 1348 n.1 (4th Cir. 1989), *cert. denied*, 111 S. Ct. 43 (1990); *Ulmer v. Harsco Corp.*, 884 F.2d 98, 101 (3d Cir. 1989); *Aubrey v. Aetna Life Ins. Co.*, 886 F.2d 119 (6th Cir. 1989).

[2] *See, e.g., Dzinglski v. Weirton Steel Corp.*, 875 F.2d 1075 (4th Cir.), *cert. denied*, 110 S. Ct. 281 (1989); *Baxter v. Lynn*, 886 F.2d 182 (8th Cir. 1989); *Baker v. Big Star Div. of the Grand Union Co.*, 893 F.2d 288 (11th Cir. 1989).

[3] Respondents argue that eligibility determinations under the 1974 Pension Plan inherently require more discretion than eligi-

B. The Trustees' Discretionary Authority Was Retained After The 1974 Agreement.

Respondents claim that prior to 1974 the trustees had complete discretion to set and change eligibility requirements, but that as a result of the 1974 Agreement, the trustees were stripped of all of this authority and did not even retain the discretionary authority to determine eligibility or to construe the terms of the Plan. (Br. in Opp. 4-5, 18-19). This assertion is not true. BCOA has never disputed the fact that the trustees can no longer set and change eligibility standards as they did prior to the 1974 Agreement. But the critical fact is that the trustees, after 1974, retained the discretionary authority to determine eligibility and to construe the terms of the Plan. That is the crucial inquiry under *Firestone*.

Respondents' assertion that the trustees lost all of their discretionary authority in 1974 is undercut by the undisputed fact that the trustees in 1978 issued numerous interpretive rules and regulations concerning eligibility for both the UMWA pension and health plans. Significantly, no one, and certainly not the union, ever questioned the trustees' discretionary authority to issue these interpretations. And the trustees' express contractual authority to construe the Plan and to determine who is eligible for benefits has been retained in each successive contract and trust document from 1978 through the present.

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bility determinations under the 1974 Benefit Plan. That is wrong, and erroneously assumes, as did *Dzinglski v. Weirton Steel Corp.*, 875 F.2d 1075 (4th Cir.), *cert. denied*, 110 S. Ct. 281 (1989), that the touchstone for the appropriate standard of review is the difficulty of the particular issue facing the trustees, rather than the authority granted the trustees under the terms of the plan. And contrary to respondents' suggestion, the "no longer in business" determination is not a mechanical and routine test. To make this determination, the trustees must investigate the financial and operational status of the pensioner's last employer and render a judgment, based on industry experience, as to whether, *inter alia*, the employer is likely to resume operations.

In summary, the district court's decision demonstrates the confusion in the lower courts in applying *Firestone*, and forebodes serious consequences for employee benefit plans if this trend is permitted to persist. If respondents' position is sustained, every employee and retiree disappointed by an unfavorable eligibility determination will be encouraged to come to federal court for a *de novo* review of his or her benefits denial. That was not the intent of this Court in *Firestone*, and it was not the intent of these negotiating parties.

II. RESPONDENTS FAIL TO SHOW HOW IT CAN BE AN ABUSE OF DISCRETION FOR TRUSTEES TO FOLLOW THE PLAN'S WRITTEN ELIGIBILITY CRITERIA.

Respondents spend two-thirds of their opposition arguing for *de novo* review because they realize that if an abuse of discretion standard is applied, they must lose. Respondents do not explain how the trustees could have abused their discretion by following the Plan's "no longer in business" eligibility criteria, and they do not contend that the pensioners in this case satisfy the Plan's written eligibility requirements. They concede that every single one of the pensioners last worked for companies that admittedly are still "in business" and operating on a nonsignatory or nonunion basis. And respondents do not deny that trustees are required by federal law to make eligibility determinations "in accordance with the documents and instruments governing the plan . . . ." 29 U.S.C. § 1104(a)(1)(D).

Recognizing that the 1974 Benefit Plan's eligibility criteria exclude the pensioners in this case, respondents argue (Br. in Opp. 20, 24) that those requirements simply do not apply. They maintain that once an employer has gone nonunion and has refused to sign a contract providing health care for its retirees, the retirees are *automatically* covered by the 1974 Benefit Plan, regard-

less of whether the employer is still in business. Respondents say that the "no longer in business" requirement applies only to *signatory* employers during the term of a contract, and not to *nonsignatory* employers that have no "legal obligation" to provide health benefits to their pensioners. This position is untenable. The contract does not contain a "legal obligation" test for eligibility. In addition, respondents' position is contradicted by the record evidence showing that the union itself considered the "no longer in business" requirement applicable to nonsignatories, and never considered "going non-union" to mean going out of business.[4]

Notwithstanding this evidence, however, respondents still argue that the trustees should not have followed federal law and the Plan's "no longer in business" eligibility test, and should have made their determination based on "other factors." These other factors are the alleged promise of lifetime benefits and the *Royal Coal* case, which are discussed in the following sections.

A. Respondents' "For Life" Argument Is Based On A Specious Premise And A Health Services Card That No Longer Exists.

Respondents' argument for ignoring the Plan's express eligibility limitations is based primarily on the erroneous

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[4] For example, in an October 2, 1979 letter from UMWA attorney Peter Mitchell to the trustees' attorney, Laura Kumin, the union acknowledged that pensioners of companies operating on a nonsignatory basis were not eligible for coverage under the 1974 Benefit Plan. (Fund Trial Ex. 9). During the 1981 negotiations, the UMWA president, Sam Church, made a proposal to add such pensioners to the Plan, and stated at the main bargaining table—"Co[mpany] didn't go out of business—went non-union," thus recognizing that such pensioners were not covered under the existing eligibility criteria. (BCOA Trial Ex. 12). And during the 1984 negotiations, the union once again proposed expanding the 1974 Benefit Plan to cover pensioners of nonsignatory employers. The UMWA's contemporaneous bargaining notes stated, "Last employer failed to sign the 1981 Agreement. Want to grandfather them in." (BCOA Trial Ex. 23).

premise that all pensioners in the coal industry, without exception, have been guaranteed lifetime health benefits. Respondents' brief contains 25 separate references to the terms "for life" and "lifetime." Respondents' major premise, however, cannot be sustained for several reasons.

First, as this Court recognized in *UMWA Health and Retirement Funds v. Robinson*, 455 U.S. 562 (1982), "for life" refers to the duration of benefits, and not who is eligible to receive them. *Robinson* shows that the collective bargaining parties live in the real world and have made compromises (sometimes considered unfair and unreasonable) concerning who is entitled to benefits, and the extent of such benefits. In *Robinson*, this Court upheld the bargaining parties' decision to grant lifetime benefits to some miners' widows but not to others. *Robinson* contradicts respondents' claim to lifetime coverage for everyone.

Second, the contract does not come close to stating that if a pensioner does not receive health benefits from his last employer, the benefits shall be provided by the 1974 Benefit Plan. If respondents' argument were correct, the negotiating parties simply could have said that the 1974 Benefit Plan shall cover all pensioners except those covered by individual employer plans. But that most assuredly is *not* what the negotiating parties did in drafting the detailed "no longer in business" eligibility criteria.

Third, as noted in the petition (at 10), the "for life" language is not eligibility language, is not included in the trust document, and is accompanied by an express disclaimer. In addition, the sole document on which respondents' argument is based is a general description of benefits in which the term "for life" refers not to benefits but to a *health services card* that was discontinued in the 1978 negotiations. Respondents attempt to rely on this health card for such a major proposition is shocking, especially

in light of the fact that the current union president, when running for office in 1982, widely publicized in the union's monthly journal the "cancellation" of the card and described its loss as "tragic." (*See* Appendix A to this brief).

Finally, the record in this case shows that the union was aware that the loss of the health card and the shift to individual company health plans in 1978 would result in less protection for its members. (*See* Appendix B). Significantly, the union at that time did not even suggest that there was an all-encompassing "safety net" to provide the broad coverage that respondents seek in this case. In short, the history vividly shows that it is the respondents who are engaging in a "cynical deception" by asserting contractual entitlements that they know were never won at the bargaining table.

B. The Decisions On Which Respondents Rely Did Not Resolve The Issue Presented Here.

Respondents assert in their brief that six other courts have addressed the precise question presented in this case, and that each of them has found the Plan to be liable. Respondents' assertion is not correct. Four of the cases cited—*Schifano*, *Grubbs*, *In re Chateaugay*, and *In re Kaiser Steel Corp.*—involved employers that went out of the coal business and filed for *bankruptcy*. The fifth case, *Crockett*, was decided on a motion for summary judgment, and there was no evidence that the employer was still operating in the coal business, like all of the employers here. And as we discussed in our petition (at 9), *Royal Coal* did not involve any consideration of whether financially viable nonsignatory coal companies can dump their retirees into the 1974 Benefit Plan, to obtain health benefits paid for by their competitors.

In summary, respondents' opposition provides no justification for the district court's *de novo* review of the trustees' eligibility determinations, and no basis to conclude that the trustees abused their discretion by following the Plan's eligibility requirements. *Firestone* does

not give federal courts a roving commission to second-guess plan fiduciaries, or to disregard a collectively bargained procedure for resolving eligibility disputes. Review is necessary in this case to clarify the substantial confusion that has arisen in the lower courts in applying the *Firestone* decision.

CONCLUSION

For all of the foregoing reasons, and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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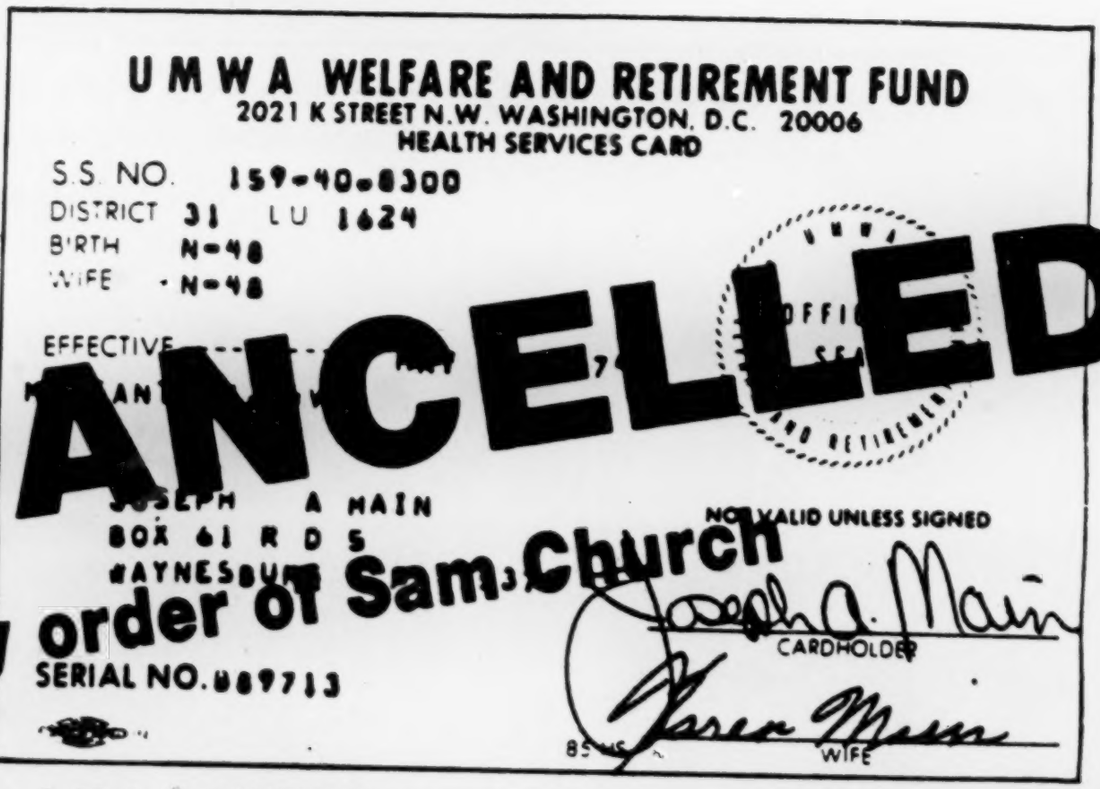
October 25, 1990

APPENDICES

SAY NO TO TAKE-AWAY CONTRACTS!

HS-85 HEALTH SERVICE CARD



CANCELLED

by order of Sam Church

In 1978 Sam Church Voted THREE Times To Take This Card Away From You

"The present trend of major corporations attempting to extract concessions from their workers might well have had it's beginning with UMWA-BCOA negotiations of 1977-78.

The negotiations, after a 111 day strike, resulted in contract losses to our membership. Perhaps the single most important loss was that of the HS-85 Health Service Card. For our union and our membership that "take-away" can only be described as tragic."

Richard Trumka
September 9, 1982

HERE'S WHY...
The Church Record

What Sam Church Has Given Away In YOUR Contract:

Weakened ☑ Job Security...

He let the operators take away your rights to subcontracted jobs; he eliminated prior practice and custom in subcontracting; he limited your rights in the event of sale or transfer of coal operations; and he limited UMWA work jurisdiction over mine construction jobs.

Today, coal production and profits are soaring and UMWA miners are being laid off in record numbers.

Weakened ☑ Individual Safety Rights...

Church agreed with the operators that miners had too much safety protection. He allowed the companies to restrict your safety rights by requiring "immediate" notification of the Supervisor and the "specific conditions" the miner believes exist. In essence, all miners now must be safety experts in order to protect themselves under the contract.

Under Sam Church, coal miners are dying at the highest rate in years.

Lost ☑ Health Card...

The UMWA health card was the crowning achievement of John L. Lewis and UMWA miners. It represented the finest health care program in the nation. It also was our greatest organizing tool because all miners recognized the value of that card—with the exception of Sam Church. He let the operators take away your health card and replace it with inferior and sometimes questionable—private insurance.

Today, miners run the risk of financial ruin because the operators may choose not to pay the premiums on health care.

Lost ☑ COLA...

Before Sam Church became an International officer, coal miners were protected from inflation by a cost-of-living allowance tied to the consumer price index. As prices rose, so did our wages. Sam Church let the operators take the COLA away because he cares more for the operators than he cares for you.

Today, miners actually earn less in real wages than we did before Church took office.

Undermined ☑ Organizing...

In the past when a signatory coal company opened a new mine, it automatically became a part of the UMWA family. Sam Church agreed with the operators that this wasn't proper and let them take this provision out of our contract.

Today, instead of organizing scab operations, our organizers spend time signing cards at companies that were organized by the UMWA long ago.

Weakened ☑ Seniority...

Seniority used to mean your length of service at the mine. PERIOD. It decided your ability to win a job bid and whether you would be laid off. Under Sam Church, the companies now have the right to assign you to **any job** when they want to realign the work force. You can be denied a job bid even if you are the most senior classified employee bidding. And companies now lay off according to job class.

Today, thanks to Sam Church, your seniority means nothing.

And remember, you were on strike for almost 200 days in 1978 & 1981 to keep the losses down to this. It would have been much worse if Sam had had his way. Just check your copies of the rejected contracts.

"One thing must be sure, not only in the bituminous coal fields of America, but in the anthracite fields as well-in this day there must be no backward step by the mine workers of this country.
"It makes no difference to the organized mine workers of this country that wage reductions have taken place in other industries."

—John L. Lewis 1922

The next UMWA President will negotiate two contracts. Who do you want in charge of those negotiations?